APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED DECEMBER 2, 2003 AND FILED JANUARY 15, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-72578

OWCP Nos. 15-43737, 2000-LHC-01877, 01-0774

KALAMA SERVICES, INC;
CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

On Petition for Review of an Order of the Benefits Review Board

Submitted December 2, 2003*
San Francisco, California

Filed January 15, 2004

Before: A. Wallace Tashima, Sidney R. Thomas, and Barry G. Silverman, Circuit Judges.

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* The panel unanimously finds this case suitable for disposition without oral argument. *See* Fed. R.App. P. 34(a)(2)(C).

Appendix A

OPINION

SILVERMAN, Circuit Judge:

We hold today that the Benefits Review Board did not err in ruling that injuries suffered by an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a "zone of special danger" created by the isolation of the island and the limited recreational opportunities available there.

Facts and Procedural History

Johnston Atoll is a United States possession, located about 700 miles west-southwest of Hawaii in the Pacific Ocean.[1] It is only two miles long and one-half mile wide. The United States military uses the atoll to store and dispose of chemical, nuclear, and other toxic weapons. Certain standards govern the conduct of inhabitants at all times during their stay on the atoll. For example, gambling and fighting are prohibited.

The United States government contracted with Kalama to provide operational and maintenance services on the atoll. In August 1996, Kalama hired Michael Ilaszczat to manage the Self Help Store on the atoll. The Self-Help Store serves local residents with materials and tools for projects. In December 1996, Ilaszczat injured his left leg in a work-related accident. As a result of this injury, Ilaszczat had a total left knee replacement in December 1998.

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1. For a history of Johnston Atoll, see *Farrell v. United States*, 313 F.3d 1214, 1216-18 (9th Cir.2002).

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On July 25, 1999, Ilaszczat injured his left hip. The hip injury is the subject of the instant claim. At about 9:30 p.m. on July 24, 1999, after completing his work for the day, Ilaszczat went to the Tiki Bar, which is one of several authorized social clubs on Johnston Atoll. At the Tiki Bar, Ilaszczat consumed two mixed drinks and played pool. He stayed at the Tiki Bar until it closed at about 12:30 a.m. on July 25. Ilaszczat then went to the AMVETS, another social club on the atoll, where he had two more mixed drinks.

There are conflicting accounts of precisely what transpired at the AMVETS, but it is undisputed that Ilaszczat fell and injured his hip there. According to Ilaszczat, he approached a group of soldiers and bought them drinks. These soldiers included Private Clyde Burum and Private Benjamin Sanchez. Ilaszczat offered to play the soldiers a game of pool for $10 per game or $10 per ball, but none of the soldiers was interested. Ilaszczat then left the soldiers and played a game of pool by himself.

Ilaszczat returned shortly thereafter. He described his second encounter with the soldiers as follows:

> [T]here was a couple of the military guys sitting at the bar and somehow the subject got around to martial arts. . . . [Burum] said he was really good at it and I said, "Well, you can't be that good at it, you know, because your hand's all screwed up." I found out later he put it through a window. . . . [H]e said that he could take his leg and put it over my head without touching me. . . . I said, "That's impossible. . . . I'm almost six foot tall."

> . . . [H]e says, "No, I can do that." I says, "Look, I'm not into that kind of crap." . . . I took my card out and I showed him my card where I got the artificial knee and I rolled up my pants to show him the scar on my other leg and he says, "No, I can do it without touching you." . . . [H]e was pretty insistent upon showing me how he could lift my [sic] leg over my head without touching me. . . . So, I went to the back of the room where the pool table and that picnic table [were] and I put my drink down on the picnic table and when he went to kick me, his foot only came up to here and I blocked it and I turned around and I said, "No, that's it. Bullshit." . . . And I picked up my drink to walk away and the next thing I know I was on the ground and my hip was broken.

Ilaszczat initially testified he had no interest in participating in the demonstration, but he later conceded he had bet Burum $100 that Burum could not put his leg over Ilaszczat's head without touching him. In describing how he had fallen to the floor, Ilaszczat testified that Burum may have "swept" his foot out from under him, or kicked him.

Burum and Sanchez offered a different account. They testified that Ilaszczat bragged he was too fast for anyone to knock him to the ground or kick him in the knee, even with his total left knee replacement. They claim that Ilaszczat sustained his injury when he "charged" at Burum immediately after the demonstration, lost his balance, and then fell to the ground. The ALJ found Ilaszczat's account to be more credible than that of Burum and Sanchez.

After the demonstration, paramedics and a police officer arrived on the scene.[2] Ilaszczat was taken to the Kalama Services Clinic, where he remained for two days, and was subsequently transferred to Hawaii for hip surgery. While recovering from surgery, Ilaszczat received a debarment order from the Johnston Atoll military commander. The order barred Ilaszczat from the island and prohibited him from ever returning as a result of the "physical altercation" that took place on July 25, 1999. Kalama terminated Ilaszczat's employment based on the debarment order. Ilaszczat moved to Honolulu, Hawaii.

Ilaszczat filed a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("LHWCA"), as extended by the Defense Base Act ("DBA"), 42 U.S.C. §§ 1651 *et seq.* His claim proceeded to trial before an ALJ in Honolulu. At trial, Ilaszczat and Kalama stipulated, among other things, that Ilaszczat: (i) was temporarily totally disabled from July 25, 1999, to January 1, 2000; (ii) attained maximum medical improvement on January 1, 2000; and (iii) has been permanently partially disabled since January 1, 2000.

The ALJ found that Ilaszczat had established a sufficient causal relationship between his injury and his employment, and awarded him disability benefits. Kalama appealed to the Benefits Review Board, which affirmed the ALJ's decision.

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2. Ilaszczat told the police officer he had just finished playing pool and was walking back to his chair when his knee gave out and he fell down. Ilaszczat admitted he had lied to the police officer because he did not want to be accused of having engaged in an "altercation," which constitutes grounds for expulsion from Johnston Atoll.

Kalama subsequently filed a timely petition for review in this court. We have jurisdiction under 33 U.S.C. § 921(c). *See Edwards v. Dir., Office of Workers' Comp. Programs*, 999 F.2d 1374, 1375 (9th Cir.1993).

Standards of Review

We review BRB decisions for errors of law and for adherence to the substantial evidence standard, which governs the Board's review of an ALJ's factual determinations. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159 (9th Cir.2002). The BRB "may not substitute its views for those of the administrative law judge or engage in a *de novo* review of the evidence." *Stevens v. Dir., Office of Workers' Comp. Programs*, 909 F.2d 1256, 1257 (9th Cir.1990). Rather, the Board must accept the ALJ's findings of fact "unless they are contrary to the law, irrational, or unsupported by substantial evidence." *Sestich*, 289 F.3d at 1159.

Discussion

Congress passed the Defense Base Act in order to provide workers' compensation coverage for certain classes of employees working outside the continental United States. *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 765 (9th Cir.1979). Rather than draft a new workers' compensation scheme, Congress used the DBA to extend the LHWCA to apply to the newly-covered workers. *Id.* The parties agree that the LHWCA, as extended by the DBA, applies in this case.

We apply the following burden-shifting proof scheme in LHWCA cases. The claimant bears the initial burden of

showing that a work-related injury prevents him from performing his former job. *See Edwards*, 999 F.2d at 1375. If the claimant makes this showing, the burden shifts to the employer to demonstrate that suitable alternative employment is available to the claimant. *See id.* An employer may satisfy this burden in two ways. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 800 (4th Cir.1999). The employer itself may make suitable alternative employment available to the injured employee. *See id.* Alternatively, the employer may show that suitable alternative employment is available to the injured worker in the "relevant labor market." *See id.* If the employer satisfies this burden, the claimant may rebut the employer's evidence of suitable alternative employment with evidence showing a diligent but unsuccessful search for such employment. *See Edwards*, 999 F.2d at 1376, n.2. If the employer does not satisfy its burden of showing available alternative employment, it must pay the claimant disability benefits. *Id.* at 1375.

In this case, Kalama does not dispute that Ilaszczat satisfied the burden of demonstrating that his injury prevented him from performing his former job. Thus, the burden shifted to Kalama to establish that suitable alternative employment was available to Ilaszczat, either within Kalama or in the "relevant labor market." However, Kalama contends that because Ilaszczat's own misconduct caused him to be barred from Johnston Atoll, it should be excused from having to make any showing of available alternative employment.

With these principles in mind, we now turn to Kalama's challenge to the BRB's decision.

Appendix A

I. "Zone of Special Danger"

Kalama first argues that Ilaszczat is not entitled to disability benefits under the Longshore and Harbor Workers' Compensation Act because his injury was not related to his employment. To establish entitlement to benefits, a LHWCA claimant bears the burden of proving that his injury "[arose] out of and in the course of [his] employment." 33 U.S.C. § 902(2); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). This standard "is not confined by common law conceptions of scope of employment." *O'Leary v. Brown-Pacific-Mason*, 340 U.S. 504, 506 (1951). For example, an employee need not establish a causal relationship between his employment and the accident that occasioned his injury. *Id.* at 506-07. "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." *Id.* at 507. Rather, "all that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *Id.*

In *O'Leary*, an employee working in Guam spent an afternoon at his employer's recreational center, which was adjacent to a dangerous river channel in which swimming was prohibited. 340 U.S. at 505. After observing two men near the channel signal for help, the employee jumped into the channel to attempt to rescue an unknown man, but drowned during the rescue attempt. *Id.* The employee's dependent mother filed a claim for death benefits with the appropriate bureau in the U.S. Department of Labor (the "agency"). *Id.* The agency granted her claim. *Id.* at 506. The Supreme Court affirmed the agency's finding that

the employee had acted reasonably in attempting the rescue and that his death could be attributed to the risks of his employment. *Id.* at 508. The Court also noted that a reasonable rescue attempt was "an incident of the service, foreseeable, if not foreseen" and therefore arose out of the "zone of special danger" created by the conditions of the employee's job. *Id.* at 507.

Courts applying *O'Leary* have held that injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales arise out of a "zone of special danger" and are therefore compensable under the LHWCA. *See, e.g., O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 363-64 (1965) (employee drowned in a weekend boating accident 30 miles from his job site at a defense base in South Korea); *Self v. Hanson*, 305 F.2d 699, 702-03 (9th Cir.1962) (employee was injured during a late-night rendezvous with her supervisor in a parked car that was hit by an out-of-control army weapons carrier in Guam); *Takara v. Hanson*, 369 F.2d 392 (9th Cir.1966) (employee was hit by a truck while hitchhiking back to his campsite after dinner at a local restaurant in Guam); *Pan Am. World Airways, Inc. v. O'Hearne*, 335 F.2d 70, 70-71 (4th Cir.1964) (death of employee in an after-hours jeep accident in the Bahamas arose out of the "zone of special danger" even though the jeep may have been speeding and the employer may not have authorized the use of its jeep); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27, (1965) (same).

By contrast, injuries resulting from recreational activities that are neither reasonable nor foreseeable generally fall outside the "zone of special danger." *See, e.g., O'Keeffe,*

380 U.S. at 362 (noting that *O'Leary* "drew the line only at cases where an employee has become 'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment' ") (quoting *O'Leary*, 340 U.S. at 507). For example, in *Kirkland v. Air America, Inc.*, 23 BRBS 348, 349 (1990), an employee was murdered during a burglary of his home. The employee's wife was implicated in the crime by the two men who confessed, one of whom was believed to be her boyfriend. *Id.* at 349, 351-52. The ALJ denied the widow's claim for benefits and the BRB affirmed, concluding, among other things, that her participation in the murder of her husband "effectively severed any causal relationship which may have existed between the conditions created by his job and his death." *Id.* at 349-50; *see also Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988) (no nexus between the conditions of an employee's job and his death by autoerotic asphyxiation).

In this case, the ALJ concluded that Ilaszczat established a sufficient nexus between his injury and his employment under the "zone of special danger" doctrine. The ALJ found that employees residing on Johnston Atoll have limited recreational opportunities and that the military expressly authorizes social clubs on the island. The ALJ also found that the presence of social clubs serving alcohol to employees who experience lengthy periods of isolation on the atoll creates a foreseeable risk that horseplay might take place from time to time. The ALJ noted that Ilaszczat was injured during a brief "one-sided" scuffle, in which Burum was the aggressor. In addition, Ilaszczat participated in the demonstration believing he would not be hurt, either because Burum would

accomplish what he had promised or because Ilaszczat would block the kick.[3] On appeal, the BRB concluded that the ALJ properly applied the "zone of special danger" doctrine.

We conclude that the BRB committed no error of law and properly held that the ALJ's factual findings were supported by substantial evidence. Of particular note is the fact that Johnston Atoll is a small, remote island—only two miles long and one-half mile wide—which offers residents few recreational opportunities. We agree that, under these circumstances, horseplay of the type that occurred here is a foreseeable incident of one's employment on the atoll. *Accord*, *O'Keeffe*, 380 U.S. at 363 (recognizing that the decedent "had to seek recreation under exacting and unconventional conditions" in South Korea); *O'Hearne*, 335 F.2d at 71 ("[c]onsidering the distant place of employment, the sparsity of population and limited area of the island, . . . the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat"); *Self*, 305 F.2d at 702 (noting that employees reasonably sought recreation at the location where claimant was injured because "[e]mployees were restricted to a most limited portion of the island [of Guam] which itself provided narrow limits of confinement"). We, like the BRB, conclude that the ALJ's decision was not irrational, contrary to law, or without substantial evidence in the record.

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3. The ALJ observed that Ilaszczat had consumed several alcoholic drinks that night. The LHWCA precludes compensation for injuries "occasioned solely by the intoxication of the employee." 33 U.S.C. § 903(c). Kalama conceded at trial that the evidence did not support a finding that Ilaszczat's injury was occasioned solely by his intoxication.

Appendix A

II. Employee Misconduct

Kalama next argues that Ilaszczat's misconduct and breach of company rules provide an independent basis for denying him disability benefits. Employee misconduct is, in general, not material in compensation law, unless it "takes the form of deviation from the course of employment." 2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 32.00 (2000). Kalama argues that Ilaszczat's conduct in this case was a "deviation" from the course of his employment. In support of this argument, Kalama relies principally on the Board's decision in *Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 26 BRBS 1 (1992).

In *Brooks*, the claimant injured his lower back while working as a joiner. *Id.* at 2. When he returned to work three days later, the claimant reported his injury to a physician at his employer's clinic and advised the physician that he had injured his back several years earlier. *Id.* The claimant worked intermittently for another three months, after which his employer assigned him lighter work issuing tools. *Id.* Two months later, the employer discharged the claimant on the ground that he had violated the labor contract by failing to disclose his previous back injuries in the employment application. *Id.* The claimant filed a claim for disability benefits seeking, among other things, compensation for several periods of time after the date of his discharge. *Id.* at 2-3.

The employer in *Brooks* argued that the claimant was not entitled to any compensation after the date of his discharge because he lost his job as a result of his own misconduct, not as a result of his injury. *Id.* at 5. The BRB agreed:

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> Because claimant's inability to perform the postinjury job at employer's facility on or after [the date of discharge] was due to his own misfeasance in violating a company rule, any loss in his wage-earning capacity thereafter is not compensable under the [LHWCA] inasmuch as it was not due to claimant's disability resulting from the work-related incident. Moreover, since claimant was discharged for reasons unrelated to his disability, employer did not have a continuing responsibility to identify new suitable alternate employment, as employer is not a long-term guarantor of claimant's employment.

Id. at 6 (citations omitted).

Kalama argues that Ilaszczat's claim is barred because, like the claimant in *Brooks*, Ilaszczat was discharged as a result of his misconduct. *Brooks*, however, does not establish a rule barring all disability benefits in cases where a claimant is discharged for misconduct. Rather, *Brooks* stands for the much narrower proposition that a claimant's post-injury job, from which he was *later* fired for cause, may satisfy an employer's burden of showing suitable alternative employment. *See, e.g., Brooks v. Dir., Office of Workers' Comp. Programs*, 2 F.3d 64, 65 (4th Cir.1993) (employer satisfied its burden of showing suitable alternative employment where a suitable alternative job within the company became unavailable to the employee because of his termination); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 43 n.4 (1996) (*Brooks* establishes that a termination for reasons unrelated to a claimant's disability "does not preclude

consideration of the job as suitable alternate employment[;]" *Brooks* does "not exempt [an] employer from meeting the normal tests for establishing suitable alternate employment").

Brooks is inapplicable here. The claimant in *Brooks* returned to work three days after his injury, worked intermittently for another three months, and was subsequently assigned lighter work at the same company for the next two months until he was discharged. *Brooks*, 26 BRBS at 2. By contrast, Ilaszczat *never* worked for Kalama again after he injured his hip. He was *not* performing suitable alternate employment at the time Kalama discharged him. Thus, *Brooks* simply does not apply. *Accord*, *Newport News Shipbuilding and Dry Dock Co. v. Riley*, 262 F.3d 227, 232 (4th Cir.2001) (*Brooks* did not apply because claimant was not performing suitable alternative employment within the company at the time she was terminated).

The BRB concluded that Kalama failed to satisfy its burden of demonstrating that suitable alternative employment was available to Ilaszczat. Kalama does not contest this conclusion in its petition for review. Instead, Kalama argues it should be excused from satisfying its burden because employees working under Defense Base Act contracts on Johnston Atoll ordinarily earn significantly higher wages than they would in non-DBA projects elsewhere. However, Kalama did not raise this argument before the BRB. Therefore, the argument is waived. *See Duncanson-Harrelson v. Dir., Office of Workers' Comp. Programs*, 644 F.2d 827, 831-32 (9th Cir.1981).

PETITION FOR REVIEW DENIED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED JUNE 19, 2002

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 01-0774

MICHAEL ILASZCZAT

Claimant-Respondent

v.

KALAMA SERVICES

and

CIGNA PROPERTY AND CASUALTY

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: JUNE 19, 2002

DECISION and ORDER

Appendix B

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order — Awarding Benefits (2000-LHC-1877) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§ 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant began working for employer in August 1996 as the manager of the "Self-Help Store" on the Johnston Atoll.[1] The "Self Help Store" served local residents, military and civilians with materials and tools for individualized projects on the island. Claimant initially sustained a work-related injury to his left leg in December 1996, which ultimately resulted in a total left knee replacement in December 1998. Claimant alleges that he also sustained an injury to his left hip on July 25, 1999, while engaging in a post-work recreational activity. At about 9:30 p.m., after completing

1. The Johnston Atoll is a two mile long by one-half mile wide island located in the South Pacific about 800 miles southwest of Hawaii. It served as a United States nuclear and chemical warfare waste storage facility until late 2000. Employer was a contractor of the United States military responsible for providing operating and maintenance services on Johnston Atoll.

his work on July 24, 1999, claimant went for drinks first at the Tiki Bar, where he remained until closing at about 12:30 a.m. on July 25, 1999, and then to the AMVETS. According to claimant, while at the AMVETS, he approached a group of soldiers, bought them drinks, and later allegedly entered into a wager with one of them, Military Police Officer Private First Class (PFC) Clyde Burum, wherein claimant bet PFC Burum $100 that he could not, in a karate demonstration, "put [his] leg over [claimant's] head without touching [claimant]." Hearing Transcript [HT] at 88-89, 103-104. Claimant stated that he set down his drink, that PFC Burum went to kick him, and that once he saw that there was no way that PFC Burum's foot was going over his head, he raised his left arm and blocked the kick. HT at 91. Claimant stated that he then picked up his drink to walk away and "the next thing I know I was on the ground and my hip was broken." HT at 86. In describing how he had fallen, claimant testified that PFC Burum may have "swept" his foot out from under him, or kicked him.[2] Claimant was immediately taken to the Kalama Services Clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering from surgery, claimant received notice from the base military commander, Colonel Jeffrey A. Thomas, that he was expelled from the atoll and was precluded from ever

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2. Claimant's version of the altercation which resulted in his injury significantly varies from those of PFC Burum and another soldier, PFC Sanchez. These soldiers described an altercation in which claimant wagered that even with his total left knee replacement, he was too fast for anyone to knock him to the ground or kick him in the knee and that claimant was injured when he charged at PFC Burum and fell to the ground. *See, e.g.*, Claimant's Exhibit 20, p. 18-19, 21-24; Claimant's Exhibit 18, p. 93-96, 99, 39-40.

returning.[3] HT at 107. Employer thereafter discharged claimant by notice dated August 5, 1999, based on the fact that the debarment order prohibited his return to the Johnston Atoll.

Claimant subsequently filed the instant claim. At the hearing, the parties entered into stipulations, and the administrative law judge thereafter issued a Decision and Order on February 9, 2001, based on those stipulations awarding claimant a 70 percent permanent partial disability scheduled award under Section 8(c)(2), 33 U.S.C. § 908(c)(2), for the work-related left knee injury which occurred in December 1996. However, with regard to the left hip injury sustained on July 25, 1999, employer asserted that claimant did not sustain a compensable injury, specifically arguing that this injury does not fall within the "zone of special danger" doctrine. Alternatively, employer averred that claimant is not entitled to permanent partial disability benefits as his alleged loss of wage-earning capacity was caused solely by his own misfeasance in violating the standards of conduct for employees on the Johnston Atoll which resulted in his inability to work for employer.

In his Decision dated June 13, 2001, the administrative law judge determined that claimant's injury is compensable under the Act, despite the fact that it did not occur while claimant was performing the duties of his employment, as a "zone of special danger" was created by the conditions of claimant's overseas job. In addition, the administrative law judge determined that claimant's conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship

3. In particular, the order prohibits claimant from returning because of the events of July 25, 1999, and characterizes those events as an "altercation." Claimant's Exhibit 10, p.2.

between his employment and the injury under the "zone of special danger" doctrine. He therefore awarded, based on the parties' stipulations, temporary total disability benefits from July 25, 1999, until January 1, 2000, permanent partial disability benefits continuing from January 1, 2000, based on a loss of wage-earning capacity of $335.60 a week, and medical benefits. Lastly, the administrative law judge found that employer is entitled to Section 8(f) relief, 33 U.S.C. § 908(f).

On appeal, employer challenges the administrative law judge's finding that claimant sustained a compensable injury under the Act, and that he is entitled to permanent partial disability benefits. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in finding that claimant's conduct fell within the "zone of special danger" doctrine since the record clearly establishes that his actions at the time of injury were grossly unreasonable, in clear violation of the standards of conduct applicable to employees on the Johnston Atoll, and resulted in his debarment from the island. Employer further argues that the administrative law judge has completely ignored the legal "reasonable recreation" standard, wherein only those incidents in which the claimant's conduct was reasonable are accepted as falling within the "zone of special danger" doctrine.

Under the Defense Base Act, the United States Supreme Court has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned

while attempting to rescue two men in a dangerous channel. The Court stated that "[a]ll that is required [for compensability] is that the 'obligations or conditions' of employment create the 'zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505. In *O'Keeffe*, 380 U.S. 359, the employee drowned in a lake in South Korea during a weekend outing away from the job. In awarding benefits, the Court noted that the employee had to work under "the exacting and unconventional conditions of Korea." *See also Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965) (awarding benefits where employee was killed in a car accident while on the way back from having a beer in town on San Salvador Island in the British West Indies).

The Board followed the Supreme Court's holdings in deciding *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978), when the employee died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. The deceased had been employed as an educational advisor by Southern Illinois University, which in turn had a contract with the United States Government to provide educational assistance to the Nepalese government. The round of golf was shown not to have been employment-related, but the Board held that this fact was insufficient to deny the claim based on precedent extending coverage under the Defense Base Act to all employees subjected to the "zone of special danger,"[4] which it defined

4. In addition to the Supreme Court decisions in *O'Leary*, *O'Keeffe*, and *Gondeck*, several circuits have applied the "zone of special danger" doctrine to award benefits in cases arising under the Defense Base Act. *See, e.g., O'Keeffe v. Pan-American World*

(Cont'd)

as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant. The Board stated that this view of the Defense Base Act was necessary because those employees who come within its ambit are subjected to unusual risks, working as they often do in the farthest reaches of the globe. In *Harris v. England Air Force Base*, 23 BRBS 175 (1990),[5] the Board further explained that "this [zone of special danger] test was formulated in cases arising under the Defense Base Act and is well-suited to those cases since the conditions of employment place the employee in a foreign setting where he is exposed to dangerous conditions." *Harris*, 23 BRBS at 179. The Board also stated that in "these cases [arising under the Defense

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(Cont'd)

Airways, Inc., 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965) (awarding benefits where employee was killed in a motorcycle accident on Grand Turk Island in the British West Indies while driving on the wrong side of the road); *Pan-American World Airways, Inc. v. O'Hearne (Smith)*, 335 F.2d 70 (4th Cir. 1964) (awarding benefits where employee was killed in the same car crash as in *Gondeck*, 382 U.S. 25); *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962) (awarding benefits where employee was injured during a midnight rendezvous in a turn-around area at the seaward end of a breakwater on the island of Guam); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (awarding benefits where employee was injured in a car accident near Anchorage, Alaska, while on the way back to camp from a sightseeing trip on a scheduled day off).

5. In Harris, a case arising under the Nonappropriated Fund Instrumentalities Act, the Board held that the administrative law judge erred by relying on the "zone of special danger" doctrine, since application of that test is limited to claims arising under the Defense Base Act and cases arising under the District of Columbia Workmen's Compensation Act. *Harris*, 23 BRBS at 178-179.

Base Act] employer can be said to create a zone of special danger by employing the employee in a foreign country." *Id.* The Board, however, has also held in a Defense Base Act case that where no evidence of record supported a determination that the activity which occasioned the employee's death was related to conditions created by his overseas job, and where the circumstances surrounding the employee's death did not in themselves suggest that the death was work-related, the "zone of special danger" test was, as a matter of law, not met. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989)(employee who asphyxiated himself while engaged in a personal activity at an Air Force base in Germany did not fall within the zone of special danger).

In the instant case, the administrative law judge found that claimant and the other employees on the Johnston Atoll had limited choices and opportunities for recreation, and that this is, presumably, the reason why the military authorized the operation of "social clubs" on the atoll. The administrative law judge further found that with the existence of clubs serving alcohol to employees, in combination with the employees' lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and employer that "risky horseplay" or scuffles such as that which occurred on July 25, 1999, would occur from time to time. As such, he determined that claimant's conduct herein was not "so far from his employment" and was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment." Decision and Order at 8, citing *O'Leary*, 340 U.S. at 507. The administrative law judge also found no evidence that claimant initiated the scuffle with PFC Burum, and held that it is apparent that he

was a "somewhat reluctant" participant in the incident. Decision and Order at 8. Moreover, the administrative law judge observed, based on the evidence, that claimant participated in the "demonstration" thinking that he would not get hurt because PFC Burum would either accomplish what he had promised or because claimant would be able to block the kick.

It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge observed in his decision, the record contains conflicting evidence regarding the events which culminated in claimant's injury on July 25, 1999. Nevertheless, the administrative law judge, after consideration of the entirety of this evidence, found claimant's version of the events to be more credible.[6] Thus, based on claimant's

6. In this regard, the administrative law judge acknowledged that claimant lied to the police officer at the scene about the events resulting in his injury, and that there was conflicting testimony from eyewitnesses regarding the exact terms of the wager, i.e., whether claimant challenged PFC Burum to try to knock claimant to his knees. The administrative law judge, however, determined that claimant's motivation for lying to the police officer, *i.e.*, he did not want to be accused of having engaged in an altercation, was apparently somewhat understandable, and that the variation in terms of the wager made no difference in his analysis of this issue.

credible testimony, the administrative law judge concluded that the conditions of claimant's employment, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a special zone of danger out of which claimant's injury arose. In particular, the administrative law judge found that claimant's injury occurred while he was engaged in reasonable recreation. As these findings of fact are rational and within the administrative law judge's authority to make, they are affirmed.

In contrast to employer's contentions, the cases wherein the zone of special danger doctrine were deemed inapplicable are factually distinguishable from the case at hand. First, in *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988), a D.C. Act case, the claimant, an off-duty bartender was injured during a fight which began on employer's premises. Although claimant may have initially responded to employer's request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, the Board affirmed the administrative law judge's finding that claimant acted voluntarily and beyond the scope of that request by going across the street to assist a patron who had run out of the bar with a two-by-four. The Board also affirmed the administrative law judge's finding that claimant was thoroughly disconnected from employer's service when he was injured, and that therefore the obligations or conditions of employment did not create any zone of special danger out of which the injury arose. Unlike *McNamara*, the administrative law judge here found claimant was not an aggressor. Moreover, it is also distinguishable from the instant case on the basis that it arose in a bar in D.C. and thus the scope of the zone of special danger was much narrower than here, where the

administrative law judge rationally found it encompassed the entirety of the Johnston Atoll, a remote and isolated location. In *McNamara*, by his own actions, the employee left the zone created by the obligations of his employment.

Similarly, in *Gillespie*, 21 BRBS 56, the Board reversed the administrative law judge's finding that claimant's death arose from the zone of special danger created by the conditions of his employment and thus his award of death benefits. In resolving this case, the Board distinguished *O'Leary* and *O'Keeffe*, on that ground that the record lacked any evidence which could be construed as supporting the administrative law judge's assumption that a relationship existed between the conditions created by the employee's job and the activity which occasioned his death.[7] Specifically, the Board, citing *O'Leary*, held that this was a case wherein the employee went "so far from his employment and [became] so thoroughly disconnected from the service of his employer" that it was unreasonable to say that his injury arose out of and in the course of his employment. *Gillespie*, 21 BRBS at 58, citing *O'Leary*, 340 U.S. at 507. In contrast, as discussed above, the administrative law judge in the instant case specifically considered the connection between claimant's injury and his work for employer and concluded, based on the evidence, that there was the requisite connection for the application of the zone of special danger doctrine, *i.e.*, that events resulting in claimant's injury were reasonably

7. In particular, the Board observed that the record lacks any evidence bearing on the claimant's motivation for engaging in the autoerotic activity which led to his death, as well as the fact that the circumstances surrounding his death do not in themselves suggest that the death was work-related. *Gillespie*, 21 BRBS 56.

foreseeable and related to his employment given the conditions associated with his job for employer on the Johnston Atoll.

Finally, the denial of benefits in *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), *aff'd mem. sub. nom. Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991), rested on the policy that a wrongdoer should not be allowed to benefit from his or her own wrong doing, and thus, contrary to employer's suggestion, did not turn on the inapplicability of the zone of special danger doctrine. In *Kirkland*, the administrative law judge determined that claimant's participation in the criminal activity leading to her husband's murder precluded her attempt to secure death benefits arising from his death. As such, the Board noted in a footnote that it need not address claimant's argument that the administrative law judge erred in finding that decedent was not killed in a "zone of special danger."[8] *Kirkland*, 23 BRBS at 353, n.6. Consequently, *Kirkland* is likewise inapplicable to the case at hand.

As the administrative law judge properly applied the "zone of special danger" doctrine in this case,[9] *see O'Keeffe*,

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8. In its decision, the Board held "that the policy prohibiting a spouse from recovering his or her ill-gotten gains, is equally applicable to this case arising under a Federal Act where a claimant, who has willfully participated in a felony leading to her husband's murder occurring in an alleged 'zone of special danger,' attempts to secure compensation benefits arising from the murder." *Kirkland*, 23 BRBS at 350.

9. Moreover, we hold that while the administrative law judge, at one point in his decision, incorrectly referred to *Hanson*, 305 F.2d 699, as *O'Keeffe*, 380 U.S. 359, Decision and Order at 8, he never-

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380 U.S. 359; *O'Leary*, 304 U.S. 504, and as his findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with the appropriate standards, his conclusion that claimant sustained a compensable injury under the Act, based on the specific facts of this case, is affirmed.

Employer also argues that the administrative law judge erred in awarding benefits to claimant since claimant's conduct resulted in his debarment from the Johnston Atoll by the base commander and justifiable discharge by employer. In support of its contention, employer cites *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director*, OWCP, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), for the proposition that where, as in the instant case, a claimant is justifiably discharged for violating company rules or performing unauthorized activities, he is not entitled to disability compensation benefits. Employer also argues that the administrative law judge's finding that claimant's expulsion from the island for participating in prohibited activity would not bar his claim for benefits is erroneous as it is based upon a misapplication of *O'Leary* and *O'Keeffe*, since in those cases employer did not seek to have the claimant terminated for violation of company standards.

In his decision, the administrative law judge found, assuming arguendo, that while claimant was engaged in

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(Cont'd)

theless set out and applied the appropriate standard, *i.e.*, whether claimant's behavior was foreseeable and reasonable given the context within which they occurred, in determining that although claimant may have violated some rules it did not preclude his recovery under the Act.

"unauthorized" or prohibited behavior (i.e., assuming that employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that claimant's behavior was unforeseeable. Specifically, in addressing this issue, the administrative law judge found that as in *O'Leary*, the incident of July 25, 1999, was certainly "foreseeable, if not foreseen" by employer, and thus the mere fact that fighting was prohibited does not necessarily preclude claimant's recovery under the Defense Base Act, even if fighting constituted grounds for expulsion from the atoll. Additionally, the administrative law judge concluded that claimant's conduct was not so egregious that it severed the relationship between his employment and the injury under the "zone of special danger" doctrine.

Employer's reliance on *Brooks* is misplaced. In that case, claimant was, as a result of an injury to his lower back sustained on May 19, 1986, intermittently off work through August 15, 1986, after which he was assigned light duty work in employer's tool room issuing tools. Claimant was subsequently discharged by employer on October 14, 1986, on the basis that he falsified company records. In its decision, the Board held that employer established suitable alternate employment as it was undisputed that claimant's post-injury job in its tool room was suitable for claimant. *Brooks*, 26 BRBS 1. Additionally, the Board held that because claimant's inability to perform the post-injury work at employer's facility on or after October 14, 1986 was due to his own misfeasance in violating a company rule, any total disability thereafter was not compensable under the Act inasmuch as it was not due to claimant's disability resulting from the work-related incident. *Id.* Thus, *Brooks* applies to

the situation wherein an employer has provided claimant with suitable alternate employment, *e.g.*, a light duty job in its facility with no loss in wage-earning capacity, and at some point thereafter claimant is discharged as a result of his own misfeasance. The holding in *Brooks* therefore does not, as suggested by employer, establish a rule barring all benefits in cases where claimant cannot return to post-injury work due to his own misfeasance. *See also Managaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Rather, Brooks addresses whether employer has a renewed burden to establish suitable alternate employment in cases where claimant is fired from a suitable post-injury job for cause.

In the instant case, claimant was never offered any position by employer post-injury, nor did employer establish that suitable alternate employment would have been available to claimant at pre-injury wages but for his discharge. Thus, the instant case does not present facts analagous to *Brooks*. In fact, at the time when claimant was permanently expelled from the atoll, August 5, 1999, claimant was totally disabled as a result of the injury sustained on July 25, 1999. In contrast to *Brooks*, claimant was not able to work when he lost his job with employer. Indeed, the parties stipulated that claimant was temporarily totally disabled from July 25, 1999, to January 1, 2000, and permanently partially disabled thereafter due to his July 25, 1999, left hip injury. Employer's burden to establish the availability of suitable alternate employment was not altered by claimant's dismissal from the atoll, as it is undisputed that claimant cannot perform his usual employment. Employer did not attempt to show the

availability of suitable alternate employment until well after the date of claimant's dismissal when it completed its labor market survey, December 15, 2000. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999). Consequently, we hold that Brooks is inapplicable to the present case, and employer is liable for total disability benefits, based upon its stipulation, until January 1, 2000, and for partial disability benefits thereafter.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER AWARDING BENEFITS OF THE UNITED STATES DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES DATED JUNE 13, 2001

U.S. Department of Labor

Offices of Administrative Law Judges
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Issue date: 13Jun2001

CASE NO.: 2000-LHC-01877

In the Matter of

MICHAEL ILASZCZAT

Claimant

v.

KALAMA SERVICES

Employer

and

ACE USA

Carrier

and

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

Before: Robert D. Kaplan

Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (the Act), as extended by the Defense Base Act, 42 U.S.C. 1651, et seq., and the regulations promulgated under the Act.

On April 17, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on December 20, 2000 in Honolulu, Hawaii, where the parties had full opportunity to present evidence and argument. The following exhibits were received post-hearing: literature from Kalama Services describing its services on the base (CX 38); Dr. Nehmer's report of February 16, 2001 (EX D); Employer's § 8(f) application (EX G); November 15, 2000 letter from OWCP regarding § 8(f) application (EX H); Director's Notice of Appearance (EX I); and my Decision and Order of February 9, 2001 (EX J).[1] Based on my prior ruling, these exhibits are

1. The following abbreviations are used herein: "CX" denotes Claimant's Exhibit; "EX" denotes Employer's Exhibit; "T" denotes

(Cont'd)

now received into evidence. Claimant and Employer/Carrier (hereinafter referred to collectively and individually as Employer) submitted briefs on April 12 and April 16, 2001, respectively. On May 17 and June 4, 2001, the parties further described their positions. This determination is based on an analysis of the record, the arguments of the parties, and the applicable law.

I. *PROCEDURAL HISTORY*

The hearing on December 20, 2000 pertained to a claim for a 1996 injury to Claimant's left lower extremity, and a 1999 injury to Claimant's left hip, both of which occurred while he was on Johnston Atoll. Claimant's 1996 injury occurred while he was working as a civilian employee managing a store on Johnston Atoll. Claimant underwent three operations, including a total left knee replacement in December 1998. (T 44-48)

On February 5, 2001, I received Claimant's and Employer's "Stipulations for Trial and of Scheduled Injury to Left Lower Extremity." (EX J) On February 9, 2001, I accepted the stipulations and issued a Decision and Order awarding a 70% permanent disability schedule award under § 8(c)(2) for Claimant's 1996 injury. (EX J) The instant claim pertains to issue relating to only the 1999 injury.

(Cont'd)

the transcript of the December 20, 2000 hearing. Where there is duplication of exhibits between the parties, reference is made to Claimant's exhibit only.

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II. *CONTENTIONS OF THE PARTIES AND ISSUES PRESENTED*

A. *Background*

The remaining question pertains to the injury to Claimant's left hip, which occurred on July 25, 1999 on Johnston Atoll. Johnston Atoll is a two miles long by one-half mile wide island located west-south-west of Hawaii in the Pacific Ocean. (CX 37, 38) The island is owned by the United States government. (T 52-53) It is utilized by the United States military for storage and decommissioning of chemical, nuclear, and other toxic weapons. (CX 3 8; T 36) Inhabitants of the island are given gas masks and injectors that they must keep with them at all times, as there is risk of contamination from exposure to toxic chemicals. (T 37-39) Kalama Services is a contractor of the United States military responsible for providing operating and maintenance services on Johnston Atoll. (CX 38; T 43-44) No civilians on the island may leave it without the prior authorization of Kalama Services. (T 63-64)

Claimant was born on September 20, 1948. (T 32) In August 1996, Claimant began working for Kalama Services on Johnston Atoll as the manager of the "Self-Help Store." (T 33) The store provides local residents, military and civilian, with materials and tools for individualized projects on the island, (e.g., supplies to make shelves; authorization for, and follow-up inspection of, air conditioning installation).[2] (T 33) While at work in December 1996,

2. Following Claimant's recovery from the 1996 injury, he returned to Johnston Atoll in early 1999 and continued working as manager with physical restrictions. (T 48-49)

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Claimant suffered an injury to his left leg. Claimant alleges that he subsequently injured his left hip on July 25, 1999, while engaging in a recreational activity after he finished working. He contends that the activity in which he was engaged at the time of the 1999 injury is covered under the "zone of special danger" doctrine applicable under the Defense Base Act. Employer disputes entitlement and contends that Claimant's conduct was not causally related to his employment, even under the zone of special danger doctrine. Employer specifically argues that Claimant's conduct leading to the July 25, 1999 injury was not authorized by either Employer or the base commander, and was in express violation of the standards of conduct applicable to employees on Johnston Atoll, as it ultimately led to Claimant's expulsion from the island by the military commander of the base. (Employer's Brief at 25) Claimant contends that he is entitled to compensation for temporary total disability from the date of the injury to the date of maximum medical improvement, and compensation for permanent partial disability thereafter. (Letter dated May 17, 2001, from Claimant's attorney to the undersigned.)

B. *Stipulations and Issues Presented*

The parties entered into the following stipulations:

- The parties are covered by the Act as extended by the Defense Base Act. (T 113-114)

- Claimant was temporarily totally disabled from July 25, 1999 to January 1, 2000, due to the left hip injury that occurred on July 25, 1999. (Letter dated June 4, 2001, from Employer's attorney to the undersigned.)

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- Claimant attained maximum medical improvement on January 1, 2000. (EX J)

- Since January 1, 2000, Claimant has been permanently partially disabled due to the left hip injury that occurred on July 25, 1999. (EX J; T 17)

- Claimant's average weekly wage with regard to the 1999 injury is $803.38, with an applicable weekly compensation rate of $535.65. (EX J; T 16-18)

- Claimant has a wage-earning capacity of $300 per week effective January 1, 2000, which results in an applicable reduced weekly permanent partial disability compensation rate of $335.65 commencing on that date. (EX J; T 16-18)

The specific issues presented for resolution are:

1. whether Claimant's July 25, 1999 injury was causally related to his employment on Johnston Atoll, and

2. if so; whether Employer and Carrier are entitled to § 8(f) relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *SUMMARY OF THE EVIDENCE*

In July 1999, Claimant left Johnston Atoll to visit his family in New York. Claimant returned to Johnston Atoll on July 24, 1999. After completing his work on July 24, 1999,

at approximately 9:30 p.m., he went to the Tiki Bar, one of several authorized social clubs on the island. (T 49-52, 57) Claimant testified that while there he had a couple of mixed drinks and played pool. He remained at the Tiki Bar until it closed at approximately 12:30 a.m. on July 25, 1999, and then went to the AMVETS, another club a few minutes away from the Tiki Bar. (T 72-75) At the AMVETS Claimant had two more mixed drinks. (T 133) The record contains varying accounts of the events of July 25, 1999. By all accounts, however, while at the AMVETS, Claimant fell and injured his left hip.

Claimant's version of the events of July 25, 1999 is that he approached a group of soldiers in the AMVETS, and, although he had never seen them before, he bought them drinks. (T 76-77) These men included Military Police Officer PFC Clyde Burum and PFC Benjamin Sanchez, Jr. (T 135) Claimant offered to play a game of pool with them for $10.00 a game, or $10.00 a ball. (T 87, 135-136) No one was interested in Claimant's offer, so he left their table and played a game by himself. Shortly thereafter, he returned. (T 88) Claimant testified about his second interaction with the soldiers, as follows:

> [T]here was a couple of the military guys sitting at the bar and somehow the subject got around to martial arts ... [Burum] said he was really good at it and I said, "Well, you can't be that good at it, you know, because your hand's all screwed up." ... [H]e said that he could take his leg and put it over my head without touching me ... I said "That's impossible, ... I'm almost six foot tall."...

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> [H]e says "No, I can do that." . . . I took my card out and I showed him my card where I got the artificial knee and I rolled up my pants to show him the scar on my other leg and he says, "No, I can do it without touching you" . . . He was pretty insistent upon showing me how he could lift my [sic] leg over my head without touching me. . . . So I went to the back of the room where the pool table and that picnic table [were] and I put my drink down on the picnic table and when he went to kick me, his foot only came up to here and I blocked it . . . I turned around and I said "No, that's it. Bull----." . . . I picked up my drink to walk away and the next thing I know I was on the ground and my hip was broken. (T 85-86)

Although Claimant initially testified that he was not interested in participating, he conceded that he had bet Burum a hundred dollars that Burum could not "put [his] leg over [my] head without touching [me]," and that he accepted Burum's offer to "demonstrate" this kick. (T 88-89, 103-104) Claimant testified that no hostile words were exchanged prior to this "demonstration."[3] (T 89)

When describing how he had fallen, Claimant testified that Burum may have "swept" his foot out from under him, or kicked him. Claimant gave conflicting testimony as to whether or not he fell on his own. (T 92, 111-112) Nevertheless, Claimant stated that the position in which he landed indicated

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3. Claimant testified that he was threatened by Burum afterwards (i.e., Burum later stated that he would "kill [Claimant]" if Claimant told anyone about the incident). (T 112-113)

that he had not fallen down on his own. (T 113) Claimant was also told by Dr. Worth at the clinic that the severity of the break could not have happened from a fall alone. (T 112) According to Burum and Sanchez, however, immediately after the demonstration, Claimant "charged" at them and then lost his balance and fell. (CX 20, p. 21-24; CX 18, p. 39-40, 93-96, 99) I find Claimant's version of the events to be more credible and supported by the evidence.[4]

Paramedics and a police officer arrived on the scene and Claimant was taken to the Kalama Services Clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. (T 101-103) While recovering from surgery, Claimant received notice from the base military commander Colonel Jeffrey A. Thomas that he was expelled from the atoll and was precluded from ever returning. (T 107) The order prohibits Claimant from returning because of the events of July 25, 1999, and characterizes those events as an "altercation." (CX 10, p. 2)

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4. The police officer on the scene, Gwendolyn Schmidt-Smith, testified that Claimant told her he had been playing pool when his knee gave out and he fell down. (CX 10, p. 9; CX 19, p. 39; CX 30, p. 3) Claimant himself testified, however, that this was not correct, and that the only reason he said that was because he did not want to be accused of having engaged in an altercation. (T 150-151) There is also conflicting testimony from eyewitness regarding the exact "terms" of the "wager." There is testimony that Claimant challenged Burum to try to knock Claimant to his knees. (CX 17, p. 25; CX 18, p. 28-29; CX 20, p. 18-19) I find that this variation would make no difference in my analysis.

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II. *APPLICABLE LAW*

A. *Defense Base Act Coverage*

The Act as extended by the Defense Base Act applies:

> in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work.

42 U.S.C. § 1651(a)(4).

"Public work" is defined as follows:

> [T]he term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

42 U.S.C. § 1651(b)(1).

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In the instant case, Claimant was employed by Kalama Services, a contractor for the United States military responsible for providing operating and maintenance services on Johnston Atoll. Kalama Services' brochure describes its role and responsibilities on the atoll as follows:

> Kalama Services is responsible for base operating services including, operating and maintaining the power generation plant; water desalination plant and all related facilities. Kalama Services is responsible for management; administration; preventative and corrective maintenance; engineering; planning; logistics; security; customer service and billing; housing and food service. Kalama Services provides custodial maintenance of all buildings; grounds upkeep including landscaping refuse collection; operations of the beauty and barber shops; laundry services and operation of recreational facilities.

(CX 38)

I find that the parties' stipulation to jurisdiction under the Defense Base Act is supported by the evidence, as the contract between Kalama Services and the United States military involves a project in connection with the national defense.[5]

B. *The "Zone of Special Danger" Doctrine*

Claimant bears the burden of establishing every requisite element of entitlement by a preponderance of the evidence. *Director Office of Workers' Compensation Programs, Dept.*

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5. The contract that Kalama Services works under requires Defense Base Act disability insurance coverage. (T 115)

of Labor v. Greenwich Collieries (Maher Terminals, Inc.), 512 U.S. 267 (1994).

Under the Act, Claimant bears the burden of proving that the alleged injury arose from a condition of, or in the course of, his employment. Under the Defense Base Act, however, the "condition or course of employment" standard has been expanded by the "zone of special danger" doctrine. The "zone of special danger" doctrine was first enunciated by the U.S. Supreme Court in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 506-507 (1951), as follows:

> The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. [internal citation omitted] Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. [internal citation omitted]

The Act provides a broad degree of coverage and entitlement to benefits which have been denied to employees only when they have been injured in "extreme circumstances with little, if any, connection to their employment." *Carlson v. Raytheon Services*, 33 BRBS 583, 589 (ALJ) (1999). Cases in which benefits have been denied include one situation where the employee asphyxiated himself while engaged in an autoerotic activity. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988). Another such case involved denial of a claim for death benefits where the widow of the employee participated in a robbery that led to the murder of her husband. *Kirkland v.*

Air America, 23 BRBS 34S (1990). On the other hand, entitlement to benefits has been granted where the employee drowned in an after-hours boating accident 30 miles from his jobsite, *O'Keefe v. Smith. Hinchman & Grylls Associate*, 380 U.S. 359 (1965); where the employee was parked in a car in a recreation area and was hit by an army weapons carrier, *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962); and where the employee was injured in a jeep accident after hours even though the jeep may have overturned due to excessive speed, and authorization to use the jeep was not certain. *Pan American World Airways, Inc. v. O'Hearne*, 335 F.2d 70 (4th Cir. 1964). In most cases, the nature of the activity must fall well outside the parameters of what is considered "recreational activity" and the foreseeable consequences related to such recreational activity in order to sever the relationship between a claimant's employment and the injury suffered.

III. *DISCUSSION*

A. *Claimant's Injury was Causally Related to his Employment Under the "Zone of Special Dancer" Doctrine*

I find that Claimant injured his hip in the incident with Burum, which can best be described as a brief one-sided scuffle occurring after Claimant had imbibed several alcoholic drinks. The first question then is the extent to which Claimant's drinking contributed to the injury to his hip on July 25, 1999. Section 3 (c) of the Act provides:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee. . . .

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Section 20(c) of the Act provides a presumption that a claimant's injury was not caused solely by the intoxication, and an employer has the burden of providing evidence which permits no other rational conclusion but that intoxication was the sole cause. Proof of intoxication alone is insufficient. *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986). When Claimant was brought into the emergency room on the morning of July 25, after he was injured, his blood alcohol level was 109, which nurse Joseph Kilpatrick testified indicated that Claimant was intoxicated. (EX B, p. 10; CX 22, pp. 39, 41-42). Assuming that Claimant was intoxicated, I find, however, that the evidence fails to establish, pursuant to § 3(c), that the intoxication was the sole cause of his injury. At most, Claimant's drinking may have been a contributing factor (i.e., had Claimant not been under the influence of alcohol he might have realized that his best course of action was simply to walk away from Burum when Burum became aggressive). But this is speculative. Further, there is no evidence that Claimant initiated the scuffle with Burum, and it is apparent that he was a somewhat reluctant participant in the incident.[6]

The next question is whether Claimant has established a relationship between his injury and his employment under the zone of special danger doctrine. I find that he has. Claimant and the other employees on Johnston Atoll had limited choices and opportunities for recreation. Presumably, this is the reason that the military authorized the operation of "social clubs" on the atoll. With the existence of clubs serving alcohol to the employees and the employees' lengthy

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6. Moreover, it appears that Employer has conceded that there is no evidence that Claimant's injury was due solely to his intoxication. (T 101)

periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and Employer that risky horseplay or scuffles such as that which occurred on July 25, 1999, would occur from time to time. Although the Court in *O'Leary* acknowledged that there would likely be cases where the employee's conduct "might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment," I find that this is not such an instance. *O'Leary*, 340 U.S. at 507. Finally, the evidence shows that Claimant participated in the "demonstration" thinking that he would not get hurt because Burum would accomplish what he had promised or because Claimant would be able to block the kick. (T 147-148)

Assuming *arguendo* that Claimant was engaged in "unauthorized" or prohibited behavior (i.e., assuming that Employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that Claimant's behavior was unforeseeable. Rather, as in *O'Leary*, the incident of July 25 was certainly "foreseeable, if not foreseen" by Kalama Services. *Id.* at 507. In *O'Leary*, the rescuing employee jumped into a swimming area that employees were prohibited from entering in order to rescue another person. *Id.* at 505. Nevertheless, the Supreme Court found that the employee's actions were foreseeable and reasonable given the context within which they occurred. In *O'Keefe*, entitlement was found for a jeep accident even though there was some question as to whether use of the jeep had been authorized. Therefore, the mere fact that fighting is prohibited does not

necessarily preclude Claimant's recovery under the Defense Base Act, even if fighting constituted grounds for expulsion from the atoll. Finally, I find that Claimant's conduct was not so egregious that it severs the relationship between his employment and the injury under the zone of special danger doctrine. *Cf.* § 20(a) of the Act.

Based on the foregoing, I find that Claimant has established a relationship between his injury and his employment, and he is entitled to benefits under the Act as extended by the Defense Base Act.

B. *Compensation for Disability*

The parties have stipulated that Claimant was temporarily totally disabled from July 25, 1999 until January 1, 2000. (Letter dated June 4, 2001, from Employer's attorney to the undersigned.)

The parties also stipulated that Claimant's applicable average weekly wage is $803.38. This was derived from his contract rate of $15.45 an hour for a 52-hour week. (Claimant worked a 48-hour week, and 8 of those hours were at time-and-a-half) For purposes of temporary total disability for the period from July 25, 1999 to the date of permanency, January 1, 2000, Claimant's 1999 rate is $535.6 per week, pursuant to § 8(b).

In addition, the parties stipulated that Claimant reached maximum medical improvement with regard to the July 25, 1999 injury on January 1, 2000 and that he had a permanent partial disability as of that date. (T 16-17) The parties agree

that as of January 1, 2000, Claimant had a wage-earning capacity of $300.00 per week. This results in a permanent partial disability compensation rate of $33.60 per week, pursuant to § 8(c)(21). (T 16-17) I find that the stipulation regarding alternative wage-earning capacity is supported by the vocational reports in evidence. (EX C)

C. *Medical Benefits*

Employer concedes that if found liable, Employer is responsible for § 7 medical benefits related to the 1999 accident. Claimant also contends, however, that after his hip surgery, his chronic osteomyelitis of the tibia "flare[d] up" again. (T 108) Claimant also argues that he has developed numbness in his hands due to carpal tunnel syndrome from using a cane and crutches after his hip surgery. (T 109) Finally, he reports that he now has back pain and has had two epidural injections because he cannot stand up straight. (T 110)

Claimant's treating physician, Dr. Gregory H. Chow, submitted several medical reports since the 1999 injury. In the most recent record, dated November 16, 2000, he wrote as follows:

> It is my opinion that the injury to [Claimant's] left hip has directly caused re-activation of his right tibia osteomyelitis which had been quite quiescent for many years in spite of multiple previous surgeries on his left lower extremity.

(CX 12) Dr. Chow explained that this "reactivation" was due to "increased demand" on the left lower extremity. In addition, Dr. Chow reported that there is also demand on Claimant's

upper extremities, due to his use of crutches and a cane, that has "possibly caused" carpal tunnel symptoms in both upper extremities. (CX 12) Finally, he reported that because Claimant is having difficulty walking, "he has started to have more back problems as well," and that these symptoms have "gotten bad enough that he has required epidural steroid injections." (CX 12) Dr. Chow's records reflect the osteomyelitis "flare-up" as early as August 9, 1999 and contain reports of back problems as early as December 29, 1999. (CX 12, p. 4-5) Dr. Chow's medical report is uncontradicted. I therefore find that Claimant's pain in the right tibia and back are causally related to the 1999 injury. Therefore, the cost of Claimant's medical treatment for back pain and tibial osteomyelitis should be paid by Employer pursuant to § 7. I further find, however, that Dr. Chow's finding regarding carpal tunnel is equivocal, as he reports only that there is a "possibl[e]" causal connection between the carpal tunnel syndrome and the added demands on Claimant's upper extremities. Therefore, I find that Employer is not liable for expenses relating to treatment for carpal tunnel syndrome.

D. *Section 8(f) Relief*

Section 8(f) is invoked in situations where a work-related injury combines with a preexisting partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991) It shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the employer to the Special Fund, established by § 44, when the disability or

death is not due solely to the injury which is the subject of the claim. § 8(f). Under § 8(f) the employer is liable for only the first 104 weeks of compensation and the Special Fund is responsible for paying weekly compensation thereafter.

Employer filed a protective application for § 8(f) relief on November 6, 2000, with the District Director after the claim had been referred to the Office of Administrative Law Judges (hereinafter "OALJ").[7] (EX G) Section 8(f)(3) permits the Director to raise an absolute defense to the special fund's liability for the payment of benefits when an employer does not file an 8(f) application prior to the District Director's consideration of the claim. On November 15, 2000, however, the District Director wrote a letter to Employer indicating that because the application for 8(f) relief was filed after the case was referred to the Office of Administrative Law Judges, OWCP had no jurisdiction to review the application and, furthermore, because permanency had not been discussed at the District Director level, § 8(f) relief would not have been applicable while the case was pending before him. (EX H) Pursuant to 20 C.F.R. § 702.321(c):

> Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the District Director to preserve the employer's right to later seek relief under section 8(f) . . .

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7. The District Director filed a notice of appearance on December 4, 2000 and argued that 8(f) relief was inappropriate because Employer had not submitted a medical report. That report, however, has since been submitted and received into evidence, and is discussed below.

Appendix C

Maximum medical improvement in this case was not established until January 1, 2000. I find, therefore, that the absolute defense does not apply to this case. Therefore, I will address the merits of Employer's request for 8(f) relief.

In order for an employer to qualify for relief under Section 8(f), the employer must show that (1) the claimant had a preexisting permanent partial disability, (2) which was manifest to the employer prior to the subsequent employment demise, and (3) the preexisting permanent partial disability combined with the injuries suffered in the most recent incident to cause a materially and substantially greater disability than would have resulted solely from the subsequent incident. § 8(f); *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314 (11th Cir. 1988); *Director, OWCP v. Newport News Shipbuilding and Dry Dock*, 8 F.3d 175 (4th Cir. 1993) *aff'd*, 514 U.S. 122 (1995).

Claimant previously was found to have suffered a scheduled permanent partial disability of 70% of the left lower extremity under § 8(c)(2) of the Act, thus satisfying the first requirement. (EX J) Second, Claimant's preexisting permanent partial disability to his left lower extremity was manifest to Employer prior to the most recent incident. Indeed, Kalama Services had actual notice of the preexisting condition because it occurred while Claimant was working for Kalama Services. Claimant's preexisting permanent partial disability was also identified in the medical records relating to Claimant's treatment and operative care. These medical records include: the report from the total left knee replacement of December 10, 1998, Dr. Richardson's treatment records beginning on May 2, 1997, Dr. Morris

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Mitsunaga's evaluation report of October 31, 1997, return to work restrictions from Dr. Richardson effective April 5, 1999, Claimant's total knee replacement card, and Johnston Atoll Health Clinic records. (CX 3, 4, 6-9) These records document Claimant's preexisting left knee osteoarthritis, tear of the medial meniscus, total left knee replacement, and resultant permanent partial disability. Therefore, I find that Claimant's preexisting permanent partial disability was manifest to the Employer, thus satisfying the second requirement.

Finally, Dr. Steven L. Nehmer, submitted a report dated February 16, 2001, based on his review of the medical records and found that Claimant's present condition is not due solely to the accident of July 25, 1999 stating:

> [Claimant's] present permanent partial disability is not due solely to the July 25, 1999 accident but is a result of that accident in combination with the pre-existing permanent partial disability [related to his prior left knee surgeries]. It is my opinion that the present [permanent] partial disability is materially and substantially greater than that which would have arisen from the injury of 7/25/99 alone.

(EX D)

The record contains no medical evidence contradicting these findings. I therefore find that the evidence establishes that Claimant's permanent disability arising out of the incident of July 25, 1999 would be less severe were it not for Claimant's preexisting permanent partial disability.

In other words, the evidence establishes that Claimant's present permanent disability is not due solely to the July 25, 1999 injury and that Claimant's preexisting permanent partial disability combined with the July 25, 1999 injury to cause a materially and substantially greater disability than the second injury would have caused in and of itself. Therefore, I find that Employer has satisfied all three requirements for entitlement to 8(f) relief.

ATTORNEY'S FEE

No award of an attorney's fee for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby allowed to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. § 702.132 and 702.133 of the regulations. A service sheet showing that service has been made to all parties, including the Claimant, must accompany the application. Parties have thirty (30) days following receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The District Director shall make all calculations necessary to effect this Order.

It is hereby ORDERED that Employer Kalama Services or Carrier shall —

1. Pay Claimant Michael Ilaszczat compensation for temporary total disability benefits in the

amount of $535.65 per week from the period of July 26, 1999 to January 1, 2000.

2. Pay Claimant Michael Ilaszczat compensation for permanent partial disability in the amount of $335.65 per week for a period of 104 weeks beginning on January 1, 2000, the date of maximum medical improvement.

3. Pay medical benefits pursuant to § 7 of the Act, for treatment relating to Claimant's hip injury, the "reactivation" of Claimant's tibial osteomyelitis, and his current back condition.

It is further ORDERED that:

1. Employer is entitled to 8(f) relief.

2. The Special Fund shall pay Claimant compensation in the amount of $335.65 per week pursuant to §§ 8(c)(21) and 8(f) of the Act for permanent partial disability beginning after the 104 weeks referred to above, and continuing.

Employer is further ORDERED to pay Claimant appropriate interest on all past due compensation from the date each payment was originally due from each of them until the date paid.

s/ Robert Kaplan
Robert D. Kaplan
Administrative Law Judge